IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5453 of 1994

with

SPECIAL CIVIL APPLICATION No 2381 of 1996

AND

SPECIAL CIVIL APPLICATION NO. 10744 OF 1996

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SPL C.A. NO. 5453 OF 1994
DAMODAR H SHAH
Versus
ASSISTANT COMMISSIONER OF INCOME-TAX

AND

SPL C.A. NOS. 2381 OF 1996 & 10744 OF 1996
SMT. RAMABEN C. PATEL
Versus
ASSISTANT COMMISSIONER OF INCOME-TAX

Appearance:

1. Special Civil Application No. 5453 of 1994
   MR JP SHAH with MR MANISH J. SHAH for Petitioner
   MR MIHIR JOSHI with MR. M.R. BHATT for Resp No.1

2. Special Civil ApplicationNo 2381 of 1996
   MR JP SHAH with MR MANISH J. SHAH for Petitioner
   MR MIHIR JOSHI with MR. M.R. BHATT for Resp No.1

3. Special Civil Application No. 10744 of 1996
   MR JP SHAH with MR MANISH J. SHAH for Petitioner
   MR MIHIR JOSHI with MR. M.R. BHATT for Resp No.1

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE A.R.DAVE

Date of decision: 22/06/2000

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

These matters raise common points and have been heard together at the instance of both the sides. The question involved is whether the impugned notices issued by the Assessing Officer against the petitioners under Section 148, read with Section 147 of the Income Tax Act, are without jurisdiction and not warranted by that provision.

2. In Special Civil Application No. 5453 of 1994, the relevant assessment years are 1987-88, 1988-89, 1989-90 and 1990-91. In respect of the assessment years 1987-88 and 1989-90, the assessment was being reopened on the ground that the assessee was allowed excessive deduction of expenses on adhoc basis though as per the CBDT circular dated 14th September, 1965 as modified by the circular dated 6.1.1984, such LIC agents who did not maintain detailed account regarding expenses incurred could be allowed a maximum deduction of only Rs. 10,000. In the reasons recorded by the Assessing Officer which are placed on record, it is stated that for the assessment year 1987-88, an amount of Rs. 44,703 had escaped assessment while in respect of the assessment year 1989-90, a sum of Rs. 49,844 had escaped assessment. In short, for these two assessment years 1987-88 and 1989-90, according to the Assessing Officer, he had reason to believe that the income chargeable to

tax had escaped the assessment because in the assessments for these two years, the income in question was made the subject of excessive relief under the Act, making them deemed to be cases where income chargeable to tax had escaped assessment within the meaning of Explanation 2(c)(iii) of the Act.

2.1 As regards the assessment years 1988-89 and 1990-91, the reasons in support of the notices issued for these years under Section 148, which are placed on record, show that according to the Assessing Officer the returns of this assessee for these two assessment years were not on the record of the office. It was stated therein that the assessee was sent a letter dated 14.2.1997, in which he was asked to state whether the returns for income for these years were filed by the assessee. The assessee was also asked to state the Ward/Circle where the returns of income were filed. It was stated that the returns for the assessment years 1987-88, 1989-90, 1991-92, 1992-93 and 1993-94 were in the office record. The assessee was requested by that letter to file a copy of acknowledgement of return of income and a copy of statement of income. However, as stated therein, the assessee did not reply within the stipulated time, a fact which has not been disputed. It is for this reason that the assessing officer had reason to believe that the asessee had not filed returns of income for these two years and therefore, the income of the assessee had escaped assessment under Section 147 Explanation (2)(a), which, inter-alia, provides that where no return of income has been furnished by the assessee although his total income was chargeable to income tax, it would be deemed to be a case where income chargeable to tax has escaped assessment within the meaning of Section 147 of the Act. In the reasons it was also recorded that the assessee's return of income for the assessment year 1987-88 disclosed an income of Rs. 60,200 and for the assessment year 1989-90, Rs. 1,06,920 and therefore, his income for the year 1988-89 was likely to be between these two figures and therefore, he had reason to believe that the income had escaped the assessment for the said year. Likewise, for the assessment year 1990-91, it was stated that his income was likely to be between Rs. 1,06,920, which was the return income for assessment year 1989-90 and Rs. 1,64,750 which was the return income for the assessment year 1991-92.

3. In Special Civil Application No. 2381 of 1996, the assessment years involved are 1986-87, 1988-89, 1990-91 and 1991-92 while in Special Civil Application

No. 10744 of 1996, the assessment year involved of the same petitioner assessee is of 1989-90. This petitioner was also an LIC agent and as per the separate reasons which are placed on record, in respect of these five assessment years which are the subject matter of these two petitions, according to the assessment officer there was escapement of income chargeable to tax under Explanation 2(c)(iii) of Section 147 of the Act, because, excess relief was granted by allowing deduction of the commission on adhoc basis beyond the maximum allowable deduction of Rs. 10,000 under the said circular dated 22.9.1965, as modified by the circular dated 6.1.1985 of the Board. According to the Assessing Officer, for the assessment year 1986-87 an income of Rs. 62,870, for the assessment year 88-89 an income of Rs. 81,473, for the assessment year 1989-90 an income of Rs. 79,121, for the assessment year 1990-91 an income of Rs. 1,14,827 and for the assessment year 1990-91 an income of Rs. 1,98,187 had escaped assessment on the ground that excessive deduction beyond the maximum limit of Rs. 10,000 per annum was allowed in respect of these years.

4. The learned Counsel appearing for the petitioners in all these matters contended that the assessing officer had no basis for issuing notices under Section 148, in respect of the assessment years in question. He contended that on a bare reading of the circulars which were issued by the Board, it was clear that the LIC agents were entitled to get deduction on adhoc basis at the rates mentioned in the circular and there was no question of applying any ceiling of Rs. 10,000 to the agents who were having commission income of more than Rs. 20,000. It was submitted that the ceiling of Rs. 6,000 which was provided in the circular dated 14/22.9.1965 was applicable only to cases where the gross insurance commission did not exceed Rs. 20,000 for the year. It was argued that in cases where gross insurance commission exceeded Rs. 20,000, the adhoc deduction allowable for expenses incurred by such agent was at the rate of 40% of the first year's commission and 15% of the renewal commission where separate figures were available and if separate figures were not available, then the adhoc deduction of 25% of the total commission was to be allowed. It was argued that the limit of Rs. 10,000 which was mentioned in paragraph 2 of the circular was not intended to be a ceiling beyond which no deduction could be allowed, but it was only an additional benefit which could be given beyond the deductions which were allowable on per centage basis and that such additional benefit not exceeding Rs. 10,000 could be given if special circumstances to justify such additional

deduction were established. It was contended that the words "aforesaid ceiling" in paragraph 2 of the circular referred to the maximum allowable adhoc deduction of 40%, 15% or 25%, as the case may be, and not the amount of Rs. 6,000 which was the maximum permissible by way of deduction only in a case where the gross insurance commission did not exceed Rs. 20,000 for the year. The learned Counsel contended that if any other view was taken, it would result in absurdity. It was argued that one cannot imagine that an agent getting gross insurance commission of Rs. 20,000 would be allowed deduction of Rs. 6,000 and an agent who may be getting gross insurance commission of several lakhs of rupees would be allowed deduction of Rs. 10,000 only. It was argued that such startling result was not intended by the Board, nor was the circular ever understood to impose such a ceiling on the gross insurance commission amount which exceeded Rs. 20,000. It was contended that the view taken by those who had occasion to construe the circulars, including the Commissioner, was that adhoc deduction was allowable at the rate of 40%, 15% or 25%, as the case may be, of the gross insurance commission upto any amount exceeding Rs. 20,000 and therefore, the exercise undertaken by initiating the proceedings under Section 147 by the Assessing Officer was an afront to the decision taken by his superiors and was nothing beyond a mere change of opinion, which was not permissible for initiating proceedings under Section 147 for assessment/re-assessment or recomputation of income.

4.1 The learned Counsel further submitted that the from circular dated 6.1.1984 in which instructions for amending the earlier circular of 14.9.1965 were issued by the Board, it could be demonstrated how absurd the result would be, if the ceiling of Rs. 10,000 was applied. He submitted that this circular dated 6.1.1984 showed that the Board, after considering the representations that the rate of deduction should be raised from 40% having regard to the increase in cost, had decided that the expenditure may be allowed at the rate of 50% of the years' commission where the gross commission was less than Rs. 60,000 and had modified the instructions issued on 14/22.9.1965 to this extent. It was submitted that even the Tribunal had, in case of another assessee [Pankaj Dhirajlal Dhru Vs. ITO, reported in (1996) 55 TTJ 667], taken a view, while construing the said circulars, that deduction was allowable at the rate of percentages mentioned in the circular and that the ceiling of Rs. 10,000 was not intended or meant to apply where the gross insurance commission exceed Rs. 20,000 in a year. It is stated by both the sides that this decision of the

Tribunal is subject matter of a reference, which is pending before this Court.

4.2 The learned Counsel further argued that in Special Civil Application Nos. 2381 of 1996 and 10744 of 1996, the Assessing Officer had already, in respect of these very assessment years, attempted rectification on the said ground that there was a ceiling in the circulars and adhoc deduction could not be allowed beyond that ceiling of Rs. 10,000. But all those rectification orders were set-aside by the CIT (Appeals) by the appellate order dated 27.3.1995. The rectification orders were made for the assessment year 1986-87 on 31.3.1993, and for the assessment years 1988-89, 1989-90, 1990-91 and 1992-93 on 18.3.1994. It was contended that when CIT (Appeals) held that there was no rectifiable mistake committed in the assessments made for these years, it was ex-facie a matter only of change of opinion and the Assessing Officer could not have initiated the proceedings on the same ground for reopening the assessment under Section 147 of the Act.

4.3 Lastly, it was contended that the assessee was not obliged to respond to the query which was raised by the Assessing Officer in his letter dated 14.2.1994 about the filing of returns. It was contended that, that letter was received by the representative of the assessee on 23.3.1994 and the assessee did not get a clear seven days time which was mentioned in the notice, to respond to it.

4.4 The learned Counsel for the petitioners cited the following decisions of the Supreme Court in support of his submissions:-

(a) R.B. Jodha Mal Kuthiala Vs. CIT, Panjab Jammu & Kashmir and Himachal Pradesh, reported in 82 ITR 571 was cited for its proposition that though it was true that equitable considerations are irrelevant in interpreting tax laws, those laws, like all other laws, are to be interpreted reasonably and in consonance with justice. In that case, an assessee whose property vested in the custodian as evacuee property, was held not to be the owner of the property for the purpose of Section 9 of the Indian Income-tax Act, 1922, because, he could not exercise any rights in that property except with the consent of the Custodian and had only some residual beneficial interest in that property which he had left in Pakistan. It

was held that such residual beneficial right cannot be considered to be ownership for the purpose of Section 9 of the said Income-tax Act. The question before the Court was as to who was the "owner" of the property for the purpose of computation of income under Section 9 of the Act.

(b) K.P.Varghese Vs. Income-tax Officer, Ernakulam, reported in 131 ITR 597 (S.C) was cited for its proposition that literal construction which leads to absurdity, unjust result or mischief should be avoided. While construing the provisions of sub-section (2) of Section 52 of the Income Tax Act, 1961, the Supreme Court held that the word "declared" occurring therein was very eloquent and revealing and it clearly indicates that the focus of sub-section (2) is on the consideration declared or disclosed by the assessee as distinguished from the consideration actually received by him and it contemplates a case where the consideration received by the assessee in respect of the transaction was not truly declared or disclosed by him but was shown at a different figure. It was held that what in fact never accrued or was never received, cannot be computed as capital gains under Section 48 and that Section 52(1) did not deem income to accrue or to be received, which in fact never accrued or was never received. The Supreme Court held that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided and where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even do some violence to it, so as to achieve the obvious intention of the legislature and produce a rational construction.

(c) CIT, Bangalore Vs. J.H. Gotla, reported in 156 ITR 323 (S.C) was cited again for the proposition that if a strict and literal construction of the statute leads to an absurd result i.e. a result not intended to be subserved by the object of the legislation ascertained from the scheme of the legislation, and, if another construction is possible apart from the strict literal construction, then, that construction should be preferred to the strict literal construction. Where the plain literal interpretation of a

statutory provision produced a manifestly unjust result, which could never have been intended by the legislature, the Court might modify the language used by the legislature so as to achieve the intention of the legislature and produce a rational result. It was also pointed out from the judgement that though Supreme Court observed that equity and taxation are often strangers, attempts should be made that these do not remain always so and "if a construction results in equity rather than in injustice", then such construction should be preferred to the literal construction.

d) The learned Counsel relied upon the decision of the Madras High Court in CIT Vs. E.I.D Parry Ltd., reported in 216 ITR 489, in which it was held that existence of the information for the belief that income chargeable to tax has escaped assessment is the sine qua non for reopening the assessment under Section 147(b) and discovery of an error apparent on the record is the sine qua non for rectification under Section 154 of the Act. It was held that Income Tax Officer can have recourse to one or the other, but he must have recourse to the appropriate provision having regard to the facts and circumstances in each case. In cases where the two appear to overlap, the Income-tax officer must choose one in preference to the other and proceed, and he should not take one as the appropriate proceeding and give it up at a later stage to have recourse to the other, since such proceedings are quasi-judicial and adjudication after notice is intended for the same purpose. In such a case of overlapping, constructive res judicata and not the statutory inhibition, should make the Income-tax Officer desist from using one proceeding after the other instead of using one of the two with due care and caution.

e) Jamnadas Madhavji & Co. Vs. J.B. Panchal, ITO reported in 162 ITR 331 (Bombay) was cited for the proposition that ITO had no power to issue summons when no proceedings were pending before the Income Tax Officer. This decision was pressed in service for contending that the letter dated 14.2.94 seeking information from the assessee could not have written by the Assessing Officer and that since no proceedings were pending at that time, the assessee was not

obliged to respond to that.

5. The learned Counsel appearing for the Revenue contended that as per the reasons recorded in writing in all these cases, the Assessing Officer was justified in proceeding to reopen the assessment of these assessees for the said years. He submitted that on a plain reading of the circulars issued by the Board, it was clear that there was a ceiling limit beyond which the adhoc deductions could not be allowed. It was submitted that the ceiling of Rs. 10,000 was not at all affected by the instructions dated 6.1.1984 which modified the circular dated 14/22.9.1965 only on the aspect of eligibility bracket upto Rs. 60,000 and the rate which was raised to 50% from 40% for the cases falling in that bracket. It was further contended that even in the two cases where the assessment was being reopened on the ground that the returns for those two years were not found in the record, the Assessing Officer had, at the relevant time, reason to believe that those returns were not filed because the assessee did not furnish many particulars though his representative was asked to furnish them, if the returns were so filed and a written communication dated 14.2.1994 was also sent to the assessee seeking this information. It was submitted that since the assessee or his representative did not furnish the particulars to show that the returns were filed, the Assessing Officer was justified in harbouring a belief that it was deemed to be a case where income chargeable to tax had escaped assessment within the meaning of Explanation (2)(a) to Section 147 of the said Act. It was submitted that even if later on the assessee comes out with a case that the returns were filed, that would not relate back and take away the justification which the Assessing Officer had at the relevant time for issuance of notice on the basis of his reason to believe that the returns were not filed. It was submitted that even after the receipt of the notice in respect of those two years, the assessee did not come forth with any such information about such returns having filed in respect of those two assessment years and it is for the first time that he has said so in the petition. It was submitted that if the assessee had, in response to the impugned notices in respect of those two years, sent his reply pointing out the fact that returns were indeed filed, that aspect would have been duly taken into account by the Assessing Officer. Even now the assessee can come forward and give particulars in response to those notices, since nothing is concluded even at this stage.

5.1 The learned Counsel further argued that in cases where there was no rectifiable mistake found after initiating the proceedings under Section 154 of the Act, but notwithstanding that fact the Assessing Officer still has a reason to believe that the income has escaped assessment, the Assessing Officer is not precluded from reopening the assessment under Section 147 in respect of the same income which had escaped assessment and for which he earlier thought that there was a rectifiable mistake. It was submitted that the ambit of Section 147 was much wider and all cases of escapement of income whether due to mistake or not, could be taken up for consideration under Section 147 for the purpose of assessment, re-assessment or re-computation.

6. In support of his submissions, the learned Counsel for the respondent referred to the following decisions:-

(a) Mayor, & c., of Westminister Vs London & North Western Railway Company, reported in (1905) HL (E) 426, a decision of the House of Lords, was cited for the proposition that the Court will not hinder the authority, which is left by the legislature with a discretion as to how it should exercise its powers.

(b) CIT, Bombay Vs. D.R. Naik, reported in VII ITR 362, was cited for the proposition that the fact that the mistake could have been rectified under Section 35 of the Act of 1922 was no reason why it should not be altered under Section 34 thereof if the case falls within that Section. It was held that there was no reason for supposing that Sections 34 and 35 were mutuallly exclusive.

(c) Salem Provident Fund Society Ltd. Vs. CIT, reported in 42 ITR 547, which followed the decision in CIT, Mumbai Vs. D.R. Naik (supra) was cited for the proposition that the real question was not whether Section 34 and Section 35 in the Act of 1922 were mutually exclusive in their operation, but whether, if in a given case the statutory requirements of both Sections 34 and 35 were satisfied, the Income Tax Officer could have recourse to either. It was observed that in such a case the fact that there was over-lapping will not bar recourse to either section at the choice of the assessing authority.

It was also held that the mistake apparent on the face of an order of assessment may itself constitutes information, and, the availability of powers vested in the ITO by Section 35 did not create a bar on the recourse to the jurisdiction vested in him by Section 34.

(d) Radheshyam Khare and anr. Vs. The State of Madhya Pradesh, reported in AIR 1959 S.C 107, was referred to, to point out that the proposition laid down in the Mayor & C., of Westminister Vs. London & North Western Railway Co. (supra) was approved by the Supreme Court. If the statute gives to the State Government powers under its various provisions and the State Government chooses in its discretion to use one rather than the other, it was beyond the power of any court to contest that discretion unless a case of abuse was made out.

(e) Cenlon Finance Co.Ltd. Vs. Ellwood (Inspector of Taxes), reported in [1962] 1 All England Law Reports 854 was referred to for the proposition that there was no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. If for any reason it newly appears that the tax-payer has been under-charged, then also reason for saying that discovery of under-charge is made, would exist.

(f) Hira Lal Sutwala Vs. Commr. of Income Tax, reported in 55 ITR 339, was cited to show that in the opinion of the Allahabad High Court, it cannot be said that if a case was governed by Section 34(I) of the Act of 1922, it may not be governed by Section 35(I). It was held that if there is a mistake apparent from the record of assessment, it can be rectified under Section 35(I) eventhough some income has escaped from assessment as a result of the mistake. Therefore, rectification of a mistake apparent can be ordered by an Income-tax Officer even if some income had escaped assessment and he could accomplish his object by proceeding under Section 34(I) instead.

(g) S. Sankappa and ors. Vs. ITO, Central Circle-II, Bangalore, reported in 68 ITR 760 was cited to show that the Supreme Court had laid down that it was clear that, when proceedings were taken for rectification of assessment to tax

either under Section 35(1) or Section 35(5) of the Act of 1922, those proceedings must be held to be proceedings for assessment.

(h) Commissioner of Income Tax, Gujarat-II Vs. Himatlal Bhagubhai, reported in 86 ITR 481, was referred, to point out that it was held by this Court that if the Income Tax Officer omits to rectify the assessment of the assessee under Section 35(5) of the Act of 1922, within the time prescribed, he was not precluded from reassessing the assessee's income under Section 147(b) of the Income-tax Act, 1961, so as to include his additional profits. It was held that where there are several distinct powers conferred on the Income-tax Officer to disturb the finality of an assessment, the Income-tax Officer may exercise any one of them.

(i) Bihar State Road Transport Corporation Vs. Commissioner of Income Tax, Bihar, reported in 103 ITR 736 was cited to point out that the Patna High Court also has taken a view that in cases where reassessment under Section 147 or rectification under Section 154 were both equally competent, the department may take action under either section, since the two sections were not mutually exclusive.

(j) Vickerman (Inspector of Taxes) Vs. Mason's Personal Representatives, reported in [1984] 2 All England Law Reports was referred to in support of the contention that an error in the computation of tax can also be a ground where the assessment to tax could be said to be insufficient. The expression "assessment to tax" covered all the various stages leading upto the calculation and statement of the amount of tax due.

(k) CIT Vs. Sun Engineering Works Pvt.Ltd., reported in 198 ITR 297 (S.C) was referred to for pointing out the scope of the powers of the Assessing Officer under Section 147 of the Act.

(l) The decision of this Court in Praful Chunilal Patel Vs. Asstt. C.I.T, reported in 236 ITR 832 was also cited to show the ambit of the powers of the Assessing Officer under Section 147 of the Act.

7. Admittedly, in these cases the petitioners who were LIC agents, did not maintain detailed accounts regarding expenses incurred by them and no such accounts were produced by them before the Assessing Officer for any of the assessment years involved in these matters. It is also an admitted fact that in all these cases, adhoc deductions for expenses were sought on the basis of the circulars issued by the Board, which fall for our consideration.

7.1 The circular dated 14/22.9.1965 which provided for the adhoc deductions for expenses in such cases and the subsequent amendment made therein by the instruction issued by the Board in its circular dated 6.1.1984 are as under:-

Board's Circular dated 14/22-9-1965:

"COMMISSION EARNED BY INSURANCE AGENTS OF THE LIC ALLOWANCE OF EXPENDITURE.

1. Where detailed accounts regarding expenses incurred are not maintained, the deduction may be allowed as follows:-

(i) An ad hoc deduction for expenses @ 40 per cent of the first year's commission and 15 per cent of the renewal commission, where separate figures with regard to the first year'sw commission and the renewal commission are available;

(ii) Where such separate figures are not available, an ad hoc deduction of 25 per cent of the total commission may be allowed.

In both the above two types of cases, however, the amount of total expenditure allowed should not exceed Rs. 6,000 per annum where the gross insurance commission does not exceed Rs. 20,000 for the year.

2. Where the gross insurance commission exceeds Rs. 20,000, if in any particular case there are special circumstances to justify deduction beyond the aforesaid ceiling, the ITO may grant a larger allowance but not exceeding Rs. 10,000. For this purpose, the ITO may take into account such factors as whether the agent's insurance activity is on a part-time basis or professional basis, whether a regular establishment is maintained, whether the business is new or established,

etc.

3. If an agent has to incur expenditure in excess of the above limits and desires allowance thereof, he should be able to maintain regular accounts of his receipts and expenses and claim the expenditure on the basis of the said accounts.

Similarly, in cases where the agents maintain complete and reliable accounts, the assessment would of course be made on the basis of the accounts and the above ad hoc deductions would not apply in their cases.

7.2 Board's Instruction dated 6.1.1984:

COMMISSION EARNED BY INSURANCE AGENTS OF THE LIFE INSURANCE CORPORATION - TAXATION OF ALLOWANCE OF EXPENDITURE.

Attention is invited to Board Circular dated 14th Sept. 1965 issued from F.No. 14-9-65 IT(A&I) on the subject. It has been mentioned in that Instruction, inter alia, that where detailed accounts regarding expenses incurred by the insurance agents are not maintained an adhoc deduction for expenses at the rate of 40 per cent of the first year's commission should be allowed. A ceiling of Rs. 6,000 in respect of such expenditure where the gross insurance commission do not exceed Rs. 20,000, this laid down and the discretion to grant a larger allowance not exceeding Rs. 10,000 in special circumstances was explained in detail.

2. The Board has been receiving representations that the rate of deduction should be raised from 40 per cent having regard to increase in costs. The Board has considered these representations and has decided that expenditure may be allowed @ 50 per cent of the year's commission where the gross commission is less than Rs. 60,000. The above instructions of 22nd Sept., 1965 are modified to this extent. It may be clarified that these instructions will also apply to commission earned by authorised agents on the deposits secured by them under the Public Provident Fund Scheme.

3. These instructions may be brought to the notice of all Officers in your charge.

7.3 The aforesaid circular and instructions were superseded, which fact we may only note by referring to that subsequent circular dated 30.3.1993 because that has

been referred to for the purpose of interpretation of the aforesaid circulars during the course of arguments. The said Circular No. 648 dated 30.3.1993 reads as under:-

1. The Board in F.No. 14/9/65-IT(A-I) dated 22.9.1965 (Annex.I), as subsequently modified in Instruction No. 1546, dated 6.1.1984 (Annex.II), had granted, subject to conditions therein specified, the benefit of ad hoc deduction in respect of the expenses incurred by agents of the Life Insurance Corporation.

2. In supersession of the above Circular and Instruction, the Board have decided that the benefit of ad hoc deduction to insurance agents of the Life Insurance Corporation having total commission (including first year commission, renewal commission and bonus commission) of less than Rs. 60,000 for the year, and not maintaining detailed accounts for the expenses incurred by them, may be allowed as follows:-

(i) where separate figures of first year and renewal commission are available, 50 per cent of first year commission and 15 per cent of the renewal commission;

(ii) where separate figures as above are not available 33 1/3 per cent of the gross commission.

In both the above cases, the ad hoc deduction will be subject to a ceiling limit of Rs. 20,000.

3. The "gross commission" in (ii) above will include first year as well as renewal commission but will exclude bonus commission.

4. The complete amount of bonus commission is taxable and will be taken into account for purposes of computing the total income, and no ad hoc deduction will be allowed from this amount.

5. The benefit of ad hoc deduction will not be available to agents who have earned total commission of more than Rs. 60,000 during the year. The admissibility of the expenditure claimed by such agents will be decided by the Assessing Officers as per the provisions of the Income-tax Act.

6. This will apply to assessment year 1993-94 and subsequent years.

8. The nature of power of reopening assessment under Section 147 is different from that of the power under Section 154 for rectifying any mistake, which is apparent from the record of the proceedings in which an order is made. The power under Section 154 to rectify a mistake is not confined only to the Assessing Officers. It can be exercised by other authorities also in respect of their orders. In rectification proceedings the jurisdictional fact is the existence of a mistake in the order, apparent from the record, which entails amendment of the order made under the Act. In case of Assessing Officer's finding a mistake from the record of proceedings in which he has made an assessment order, he, on having noticed the mistake, can proceed to rectify it under the provision when according to him, there is no need to reopen the assessment proceedings and it is a mistake rectifiable under Section 154. When the amendment of the assessment order for rectifying the mistake which is apparent from the record has the effect of enhancing the assessment or increasing the liability of the assessee or reducing a refund, it cannot be made without giving notice to the assessee of the intention to make the amendment in the order with a view to reftify such mistake. The nature of such notice under Section 154(3) for rectification is quite different from the nature of the notice required to be given under Section 148 for the purpose of making the assessment, reassessment or recomputation of the income chargeable to tax in respect of which he has reason to believe that it had escaped assessment. In a notice under Section 154(3) of the Act, the Assessing Officer has already identified such mistakes from the record of the proceedings and wants to amend the order to rectify the mistake and such intention is to be mentioned in the notice under Section 154(3) of the Act. The assessee is given an opportunity of being heard by such notice because an adverse order is likely to be passed against him due to detection of such mistake. It is not an inquiry in to finding out a mistake from record, but only a rectifying process undertaken on the basis of mistake noticed from the existing record of the proceedings in which the order is made. The assessee can come forward and say that there is no such mistake apparent from the record, which needs to be so rectified. The whole emphasise in the rectification proceedings is on the existence of mistake in making of the order which is obvious i.e. easily understood from the record. If what appeared to the Assessing Officer to be a mistake in his order, apparent from the record turns out to be no mistake apparent from

the record, as it stood, the rectification aspect will not survive under this provision.

8.1 The expression "mistake apparent from the record" occurring in Sec. 154 would mean, in the context of the provisions, that it should be evident on a reasonable reading of the record to show that there has been committed by the Assessing Officer a mistake in the order which needs to be rectified. The expression " from the record" entails reading of the record and not a cursory look at its bulk. The word "apparent" does not dilute the need to read the record for ascertaining whether there is a mistake on its plain reading. If the record so read is not at all capable of being construed in a different manner and the misake is demonstrated on its plain reading, it would be a mistake which is apparent i.e. evident or obvious from the record and ought to be rectified under Section 154. If however, on reading the record it cannot be said that the view taken in the order is mistaken there would be no question of rectification because there is no mistake obvious from the record which could be rectified. A mistake may have arisen due to mere ignorance or forgetfulness of a fact or out of a belief that a particular fact exists when it does not or it may be a glaring mistake of law. Mistake apparent from the record is a mistake, which is ex-facie borne out from the plain reading of the record of the proceedings as it stands. On the basis of the record of the proceedings it becomes obvious that there is a mistake committed i.e. incorrect conclusion reached -- a mistaken conclusion which is not at all warranted from this record. If however, the conclusion is plausible and may be warranted from the record then it cannot be said that from the record the mistake is intellectually evident or obvious. If on the existing state of record, permissible discretion is exercised or two views are reasonably possible including the one which is taken, then it cannot be said with the required certainty that there is a mistake in the order which is apparent from the record.

9. On the other hand, the emphasis of the proceedings under Section 147 is entirely on the question whether according to the Assessing Officer income chargeable to tax has escaped assessment for any assessment year irrespective of the question whether there is or not an obvious mistake in the assessment order that he may have passed. In the assessment proceedings under Section 147, the Assessing Officer is not just wanting to correct the mistake that is identified by him, by amending the order on the basis of

the record of the proceedings, but wants to find out the chargeable income that according to his prima-facie view had escaped assessment when the order of assessment was made. The reason to believe under Section 147 is about the chargeable income having escaped assessment, the ascertainment of which requires reopening of the assessment by following the procedure as indicated under Section 148 of the Act. In all cases of income having escaped assessment, including the cases where mistake is committed in the assessment order, it would be open for the Assessing Officer to proceed under Sec. 147 for assessment, re-assessment or recomputation. However, in a case where according to him the assessment order requires to be amended by rectifying the mistake detected by him which is obvious or evident from the existing record and according to him there is no need to reopen the assessment for any additional material, information, investigation or scrutiny, he may resort to Section 154 and rectify it by amending the assessment order as per Section 154(3) of the Act. In fact, Section 154 would cover all cases of mistakes apparent from the record, which could be rectified by the concerned authorities. Mistake apparent from the record which has the effect of enhancing assessment ought to be rectified by resorting to this special and speedy procedure when in the view of the Assessing Officer it is unnecessary to resort to reopening of the assessment. In the field of chargeable income escaping assessment, however, Section 147 is very widely worded and would include even escapement due to any mistake in the assessment order. But, when even according to the Assessing Officer himself there is a mistake, apparent from the record as it exists, committed in the order of assessment, which is rectifiable on the basis of the existing record under Section 154 being a special provision made for the purpose, and that there is no need to resort to reopening of the assessment as contemplated by Section 148 read with Section 147 of the Act, then he must resort to the provision and cannot wantonly or arbitrarily and without valid reason resort to reopening of the assessment.

10. The process of assessment, re-assessment and recomputation under Section 147 is much more onerous to the assessee than the process of rectification under Section 154 of the Act. The proceedings under Section 147 for assessing income chargeable to tax that has escaped assessment would very often involve a complete rewriting of the original assessment. Once the Assessing Officer has reason to believe that income has escaped assessment, he is at liberty to reconsider the whole matter, at all events in relation to everything that is material to the

assessment of the tax under the head of liability affected. He is at liberty to reconsider the whole question of how he would ascertain the assessable and taxable income of the tax-payer. The function of the Assessing Officer acting under Section 147 is not limited, as under Section 154, merely to rectifying the result which may have been vitiated due to mistake apparent from the record. It would therefore follow that in cases of mistake resulting in escapement, which is the area where both the provisions would become relevant, the Assessing Officer will have to consider whether he was required by the nature of escapement to reconsider the question of how he would ascertain and assess income that has escaped assessment and reopen the assessment or if that is not required then merely to rectify the mistaken result on the basis of the existing record. If he chooses to resort to the former i.e. Sec. 147 read with Section 148 proceedings, he cannot be compelled to resort to Section 154 because that would impinge upon his subjective satisfaction under Section 147. But if he resorts to Section 154 on the ground that the mistake in the order apparent from the record has resulted in escapement which could be rectified by amending the order and enhancing the assessment, then he, on finding that there is no such mistake apparent from the record warranting rectification since the view taken is plausible, cannot in absence of any other ground on the basis of which he has still reason to believe that the income has escaped assessment, start proceedings again under Section 147. If he finds that there is no such mistake since the result was warranted from the record, there would be no occasion to amend the assessment order. Where the rectification could not be done on the ground that there were two views possible or that there was discretion lawfully exercised, then the same will also be true even when the Assessing Officer starts the proceedings under Section 147 on the same material, because, that power cannot be invoked when there is only a mere change of opinion and in cases where in the proceedings under Section 154 it is found that what was thought to be a mistake was not a mistake because that view was warranted or permissible from the existing record, then the same finding will bind the Assessing Officer when trying to exercise powers under Section 147. In such a case, it would be incumbent on the part of the Assessing Officer who had chosen to resort to Section 154 to demonstrate why he is now for the same purpose resorting to Section 147. There has to be some compelling reason in such a case for him still to believe that the income that was the subject matter of rectification has escaped assessment though that was not

due to any obvious mistake borne out from the existing record, which could be rectified under Section 154. To prevent arbitrary exercise of power and fishing expeditions, it would therefore be necessary for the Assessing Officer who has in respect of the same subject matter not been able to find existence of the mistake which he earlier thought was apparent from the record, i.e. on the basis of the existing material on the record, in order to resort to Sec.147 for reopening the assessment, to record that though the mistake in assessment is not obvious from the record, he still has reason to believe that the said income had escaped assessment warranting reopening of the assessment under Section 147 of the Act. It will not be open to the Assessing Officer to arbitrarily or wantonly resort to the provisions of Section 147 where the process of rectification under Section 154 fails on merits.

11. In the case of the petitioner in Special Civil Application No. 5433 of 1994, the reasons which are recorded for reopening the assessment for the Assessment years 1988-89 and 1990-91 show that the notice under Section 147 was issued because the Assessing Officer had reason to believe that the income had escaped assessment for these years as the assessee had not filed the returns. Under Section 147, if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may assess or reassess or recompute such income. The expression "escaped assessment" as per Explanation 2(a) would by a deeming fiction include cases where no return of income has been furnished by the assessee, when his income was chargeable to tax. This means that if the Assessing Officer has reason to believe that the assessee has not furnished the required return of his income, then that would constitute a reason to believe that the income chargeable to tax has escaped assessment. Ordinarily when returns are filed that would be to the knowledge of the department. However, there are peculiar facts of this case on the basis of which according to the Assessing Officer he had reason to believe that the returns were not filed. The petitioner was specifically asked to file the copies of acknowledgement slips of the return of income for the years 1988-89, 1989-90 (the record of this year was later transferred to the Assessing Officer from the salary ward and therefore no notice was issued for that year), and 1990-91 as stated on oath in paras 6 and 7 of the affidavit-in-reply. In fact, letter dated 14.2.1994 at annexure "B" to the reply was issued to the petitioner requesting him to file copies of acknowledgement slips of the returns and

statements of income for these Assessment years, if filed. The petitioner was told that if this request was not complied with it will be presumed that he had not filed returns of income for these years. The petitioner did not respond to this specific request. The Assessing Officer therefore, had a reason to believe that the petitioner had not filed the return of income for the assessment years 1988-89 and 1990-91, for which the impugned notice was issued. The learned Counsel for the respondent on being asked has stated that even now the returns of these two years are not found in the record of the office. A copy of reasons reduced in writing dated 31.3.1994 for the assessment years 1988-89 and 1990-91 placed on record at Annexure "E" collectively of the affidavit-in-reply at page 75 of Special Civil Application No. 5433 of 1994 clearly bears out these facts which are stated on oath. The petitioner did not respond to the inquiry of the Assessing Officer whether he had filed these returns. If the petitioner had pointed out the acknowledgements, the xerox copies of which are annexed now with the petition, to the Assessing Officer, then the Assessing Officer would not have had such reason to believe. However, when inspite of oral and written inquiry the petitioner and his representative did not respond, it cannot be said that there was no basis at that time for the Assessing Officer to form a reason to believe that the returns were not filed. If the reason to believe turns out to be wrong during the proceedings as it can in many cases, it cannot be said that at the time of initiation of the proceedings it did not exist. The contention of the learned Counsel that the assessee was not obliged to respond to the letter dated 14.2.1994 of the Assessing Officer seeking information whether the petitioner had filed returns for the years mentioned therein, is misconceived, because, the Assessing Officer was empowered to seek information from the assessee whether he had filed the returns when they were not found in the record. Such information was useful or relevant to the proceedings under Section 147 for finding out whether there was any reason for him to believe that the returns were not filed by the assessee. An enquiry of this nature is clearly warranted by the provisions of Section 147 itself, with a view to find out whether the returns have been filed, since the office record did not disclose filing of such returns. In the decision in Jamnadas Madhavji & Co. Vs. J.B. Panchal, ITO (supra) summons for production of documents and furnishing information was issued when no proceedings were pending, and it is in that context it was held that there were no proceedings pending and therefore, summons was liable to be quashed That decision cannot have any

bearing on the type of enquiry that was being made from the assessee to find out whether he had filed the returns or not. The Assessing Officer, in any view of the matter, had at the relevant time reason to believe that the returns were not filed and therefore issuance of the notice under Section 147 cannot be said to have been done without jurisdiction. The assessee can even now answer these notices and point out that the returns were filed and that there was no escapement of income chargeable to tax.

12. The notices for the Assessment Years 1987-88 and 1989-90 (the return of which was found from the record transferred on inquiry by the Assessing Officer by the ITO of the Salary Ward as stated in para 8 of the affidavit-in-reply) in Special Civil Application No. 5453/94 and for all the assessment years in Special Civil Application Nos. 2381/96 and 10744/96 were given for the reason that the maximum amount of deduction to which an LIC agent was entitled was only Rs. 10,000/- as per the Circular dated 14/22.9.1965 as amended by the Circular dated 6.1.1984. The circular dated 14/22.9.1965 provided for allowing an adhoc deduction at the rate of the percentage specified of the commission where detailed accounts regarding expenses incurred were not maintained by the LIC agent. However, the amount of total expenditure allowed was subject to a ceiling limit of Rs. 6000 per annum where the group commission did not exceed Rs. 20,000. When it exceeded Rs. 20,000, deduction beyond the aforesaid ceiling could be granted, but not exceeding Rs. 10,000. If the agent had incurred expenditure in excess of the above limits and desired allowance thereof, the regular accounts were required to be maintained. The deductions were not admissible on this adhoc basis where complete and reliable accounts were maintained. The Instruction dated 6.1.1984 by para 2 raised the percentage of allowance to 50% of the years' commission where gross commission was less than Rs. 60,000/- and modified the circular of 22.9.1965 only to this limited extent. The limit of Rs. 60,000 was obviously meant to identify those who would be eligible for claiming the adhoc deduction at the higher rate of 50%. It did not disturb the earlier circular on the aspect of the ceiling limits of Rs. 6000 and 10000. In other words these ceilings were not modified. It may be noticed that later, by circular No. 648 of 30.3.1993, the circular dated 14/22.9.1965 and the instruction dated 6.1.84 were both superseded and it was provided that those who were having total commission of Rs. 60000 for the year and did not maintain accounts they may be allowed deduction at the percentage specified (50% for

first year etc.). This was however made subject to a ceiling limit of Rs. 20000. The benefit of ad hoc deduction was now not at all available to agents who earned total commission of more than Rs. 60000 during the year. Thus, even under this circular an agent who earns commission of Rs. 60,000 cannot claim deduction of Rs. 30000 at 50% in view of the ceiling of Rs. 20,000. In fact the interpretation suggested on behalf of the petitioners that the ceiling of Rs. 6000 which restricts the deduction for those who earned total commission upto 20000 and who could have claimed upto Rs. 8000 if the matter was to be decided only on the percentage basis, and that there was no ceiling at all for those who earned such commission income of even more than Rs. 60,000 sounds somewhat odd in view of the scheme of grant of such benefits, such as standard deductions, under the Act, to provide greater relief to those who fall in the lower income group. Claim to deductions of expenditure higher than the ceiling could always be made if accounts were duly maintained. There appears to be no justification for the criticism that the approach of the Assessing Officer was based on a reading of the circular which can be said to be absurd or startling. Having regard to the nature of the Board's circular dated 14/22.9.1965 read with the amending instruction dated 6.1.1984, it cannot be said that the Assessing Officer could not have formed a belief that the income chargeable to tax had escaped assessment in view of the ceiling referred to therein. The requisite jurisdictional fact for the issuance of the notice under Section 147 did exist and there is no valid reason to thwart the proceedings under Section 147 at the threshold. It will be open to the petitioners to respond to the impugned notices on merits and raise all the contentions that they may want to raise in accordance with law against the impugned notices, including on the question of the interpretation of the said Circular and Instructions. What CIT may have done in an earlier case of one of these two assessees under Section 263 of the Act could not have prevented the Assessing Officer from forming his belief on the aspect of income having escaped assessment in respect of the assessment years in question.

12.1 In the case of the petitioner of Special Civil Application No. 2381/96, the Commissioner had exercised power under Section 263 in respect of the assessment year 1984-85 (see order at page 12 annexure "B" in Special Civil Application No. 2381/96). But in that matter the only question was whether the excess deduction of 50% as against 40% was warranted. The only aspect considered was whether this could be done under the Board's

instruction dated 6.1.1984. The ceiling question was not at all gone into in that matter. It was held that the expenditure from gross commission should be allowed to be deducted at 40% and not at 50% as the commission exceeded Rs. 60000. This order could not have taken away the power of the Assessing Officer to exercise his statutory function under Section 147 in respect of the other assessment years.

13. As held above, if it were held that there was no mistake and because the view taken by the Assessing Officer was plausible and therefore, the assessment was right and needed no rectification, then in the same set of facts and without need of any further investigation by reopening the assessment, there would be no occasion to again go into the same matter under Sec.147 of the Act. After the Assessing Officer or his superior in appeal holds that it is not evident from the record that the view taken is mistaken and that from the existing record such a view can validly be taken, then Assessing Officer cannot arbitrarily or wantonly resort to Section 147 in absence of his still having reason to believe that the income has escaped assessment though not due to a rectifiable mistake, as held by us above. In the case of the petitioner of Special Civil Application No. 2381/96 and 10744/96 this was not the case. The Commissioner did not hold in his order dated 16.4.1994 (page 50 of Special Civil Application No. 2381/96) that there was no mistake. He mainly formed his opinion on the basis of some Board's Circular dated 26.9.94 and held that the mistake stated by the Assessing Officer was not rectifiable under Section 154. This cannot be construed to mean that the escaped income came to be accepted by the superior authority as contended in paragraph 4 of the petition, nor can it be said that the Commissioner had held that there was no mistake because the view taken was plausible. The Commissioner could not have gone into the question whether Section 147 was attracted in the case because that was within the domain of the Assessing Officer to decide. It will be noticed from the order of the Commissioner that he has just reproduced the contentions till the last paragraph of his order and then simply said that he had considered the rival submissions and without going into the merits of respective submissions, there is no case for rectification. He has then cursorily observed that the mistake of allowing excessive deduction cannot be set right under Section 154 since the issue involved was a controversial issue. Therefore, if in the belief of the Assessing Officer, notwithstanding the fact that escapement was not due to a mistake which could be rectified under Section 154 of the

Act, but it still persists he has his power coupled with duty to go into the question under Section 147 of the Act when he has reason to believe that the income chargeable to tax had escaped assessment. Therefore, it cannot be said that the jurisdictional fact for initiating proceedings under Section 147 of the Act did not exist in respect of assessment years which are the subject matter of Special Civil Application Nos. 2381/96 and 10744/96.

14. In the result, therefore the challenge of the petitioners in all these petitions against the impugned notices issued under Section 148 of the Act for reopening the assessment under Section 147 thereof fails. The petitions are therefore rejected. Rule is discharged in each of them with no order as to costs. Interim relief stands vacated.

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